IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.815 OF 1998
IN
NOTICE OF MOTION NO.1653 OF 1997
IN
SUIT NO.2004 OF 1997

Middle East Bank, a bank operating under the laws of the United Arab Emirates and having a branch at Murshid Bazar Branch, P.O.Box 5547, Dubai, United Arab Emirates. .. Appellant (Org.Deft.No.3)

Versus

1. Prarthana International, a partnership firm registered under the Indian Partnership Act, 1932 having its Administrative Office at B.S.Cross Road, Hedavkar No.3, Near Jaigopal Ind. Estate, Dadar (W), Mumbai 400 028.

2. Prarthana Impex Pvt. Ltd., a company incorporated under the Indian Companies Act, 1956 having its registered office at B.S.Cross Road, Hedavkar No.3, Near Jaigopal Ind.Estate, Dadar (W), Mumbai 400 028. .. Respondents (Org.Plaintiffs)

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ShriJ.P.Sen with Smt. Ferzana Behramkamdin i/b FZB & Associates for the Appellant.

S/Shri M.S.Sanghavi, Sr.Advocate, with V.J.Pereira and S.Mishra i/b Divya Shah Associates for Respondent No.1.

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CORAM : R.M.S.KHANDEPARKAR &
DR.D.Y.CHANDRACHUD, JJ

DATED : 8TH FEBRUARY, 2007

ORAL JUDGMENT: (Per DR.D.Y.CHANDRACHUD, J)

1. This appeal arises out of an order dated 25th June, 1998 passed by a learned Single Judge by which a notice of motion seeking an order of injunction restraining the 4th respondent, the State Bank of India, from making payment of the proceeds of an unconditional bank guarantee to the appellant has been allowed.

2. A contract was entered into between the 1st respondent herein and the 3rd respondent, a company incorporated in the United Arab Emirates, on 12th March, 1996 by which the 1st respondent was to supply and deliver a consignment of readymade garments to the 3rd respondent. The terms and conditions of the contract, inter alia, provided that the 1st respondent would route all shipping documents to the 3rd respondent through the bankers of the 1st respondent "in declaring details of advance remittance" which would be honoured by the Third respondent through Middle East Bank Dubai, the appellant herein. Clause 3 of the conditions stipulated that on receipt of goods, the 3rd respondent shall collect the sale proceeds, deposit such amount from time to time and

get the liability reduced with the appellant herein who in turn would report such credits to the State Bank of India, who were the bankers of the 1st respondent. Clause 8 of the conditions of contract provided as follows:

> "8. All the shipments are to Dubai Seaport and goods to be consigned to us directly but to be routed through Middle East Bank/Dubai quoting reference of advance payment with clear instructions to deliver us document free."

3. In pursuance of the agreement between the parties, an unconditional bank guarantee was issued on 11th May, 1996 by the State Bank of India, the 4th respondent, to the appellant herein. The material terms of the guarantee provided as under:-

> "This guarantee is issued in consideration of M/s.Sheemo Textiles Co. Ltd. P.O.Box.21113, Sharjah, UAE, making the advance payment of USD 130,500/- to M/s.Prarthana International B.S.Cross Road, Hedavkar No.3, Near Jaigopal

> Industrial Estate, Dadar, Bombay 400 028, (INDIA) in connection with supply of readymade garments from India to M/s.Sheemo Textiles Co. Ltd., Sharjah, UAE, within a period of one year from the date of reception of advance payment of USD 130500/- in INDIA. We hereby unconditionally and irrevocable undertake to pay you on your first written demand upto USD 145000/- despite any contestation by M/s.Prarthana International, Bombay (INDIA)".

4. The guarantee was to come into force immediately on payment of USD 130,500/- being made by the 3rd respondent and was to remain in force until 31st May, 1997. The guarantee stipulated that a claim made by the appellant would be honoured by the issuing bank on receipt of "written demand" despite any protest or contestation by the 3rd respondent.

5. On 16th May, 1996, the 3rd respondent called upon the appellant to discount the aforesaid Guarantee which was in the amount of USD 145,000/- and to remit an amount of USD 130,500/- to the account of the 3rd respondent after deduction of charges. This was

accordingly done by the appellant. Three consignments of the goods contracted for were supplied by the 1st respondent to the 3rd respondent. On each occasion, the Document Collection Advice issued by the State Bank of India, acting as bankers for the 1st respondent, contained the following instructions:

> "Documents as under to be delivered to the drawee against (sic) free of payment."

The Drawer under the Documentary Collection Advice was the 1st respondent and the Drawee was the 3rd respondent herein.

6. The guarantee was invoked by the appellant by a letter dated 17th May, 1997, upon which the 4th respondent issued an Advice on 3rd June, 1997 to the 1st respondent to arrange for funds amounting to Rs.53 lakhs to enable the bank to honour the claim under the guarantee.

7. At the ad-interim stage, the appellant was not present and an ad-interim order was passed by a learned Single Judge on 10th June 1997. The ad-interim order was confirmed on 25th June, 1998 and the Motion was made absolute in terms of prayer

clauses (a) and (b). As a result, the State Bank of India, which is the issuing bank, has been restrained by an order of injunction from paying over the proceeds of the bank guarantee to the appellant.

8. In confirming the ad-interim injunction, the learned Single Judge has observed that as against the advance payment of USD 130,500/-, the 1st respondent - original plaintiff, had despatched goods to the 3rd respondent worth USD 129,000/- and there was, therefore, full compliance by the 1st respondent of the terms and conditions of the contract. The learned Single Judge observed that it was true that the Document Collection Advice authorised the appellant herein to deliver documents to the 3rd respondent free of payment. However, the learned Single Judge held that since the goods were shipped by the 1st respondent on several occasions, despite which, no payment was made by the 3rd respondent to the appellant herein, it was for the appellant to take care of its interest. In these circumstances, it was held that a denial of an order of injunction would result in irreparable injustice to the 1st respondent who had already supplied the goods under the contract to the 3rd respondent. The learned Single Judge was of the view that in that event the 1st respondent

shall be subjected to irretrievable injustice in pursuing proceedings before an appropriate court in the UAE for recovery of its dues. The judgments of the Supreme Court which were cited before the learned Single Judge have been distinguished on that ground.

9. On behalf of the appellant, it has been submitted that the issuing bank had furnished an unconditional bank guarantee in favour of the appellant and the terms of guarantee stipulated that the guarantee would be honoured without any contest or demur on a demand being lodged by the appellant in terms thereof, and it is a well settled principle of law that save in the case of an established fraud or irreparable injustice, an injunction ought not to be granted on the invocation or encashment of an unconditional bank guarantee. Moreover, it was urged that the Document Collection Advice which was addressed to the appellant by the State Bank of India which was acting as bankers of the 1st respondent specifically provided that the documents will have to be delivered to the Drawee free of payment. As a result of the terms of the aforesaid Advice, the appellant herein urged that it was precluded from withholding documents without receipt of payment from the 3rd respondent. Learned counsel, while drawing

the attention of the Court to the terms of the contract between the 1st respondent and the 3rd respondent submitted that the contract stipulated that all the shipments would be routed through the appellant with clear instructions to deliver the documents free of payment.

10. On the other hand, it is urged on behalf of the 1st respondent, the original plaintiff, that the plaintiff had fulfilled its obligations under the contract by supplying and delivering the material that was ordered. In that event, the very purpose of the guarantee would stand extinguished. Furthermore, it was also urged that the Document Collection Advice to the effect that the documents should be delivered free of payment, would not regulate the conditions of contract between the Appellant and the third Respondent. In these circumstances, it was urged that the grant of injunction cannot be faulted.

11. A perusal of the order passed by the learned Single Judge will show that there is no finding in the impugned order either to the effect that the 1st respondent had established a case of fraud or for that matter, that the guarantee stood extinguished on the terms thereof. The only ground which weighed with the

learned Single Judge was that invocation of the guarantee would result in irreparable injustice since the 1st respondent, the original plaintiff, having supplied the goods under the contract would have to face the hardship of having to institute proceedings before an appropriate forum in the UAE for the recovery of its dues. In our view, it was only necessary and proper that the learned Single Judge should consider an application for the grant of an injunction restraining the invocation of an unconditional bank guarantee on the touchstone of the well settled tests which have been formulated by the Supreme Court in that regard. That ex facie has not been done. In this view of the matter, it would be appropriate to remit the proceedings back to the learned Single Judge for reconsidering the application for the grant of interim relief afresh. While doing so, we keep all the rights and contentions of the parties open for being urged before the learned Single Judge.

12. The Notice of Motion has been pending since 1997. We would request the learned Single Judge to consider an expeditious disposal of the Motion consistent with the exigencies of work, preferably within a period of three months from today. In the

meantime, for a period of three months, or until the Motion is disposed of, whichever is earlier, the ad-interim relief which operated during the pendency of the Notice of Motion shall continue to remain in operation in view of the restoration of the Motion. The Plaintiff will be at liberty to apply for extention of the ad interim order thereafter, in the event that the Motion is not disposed of in three months, before the Learned Single Judge. In order to facilitate a fresh decision, the impugned order dated 25th June, 1998 is set aside. The Appeal is accordingly disposed of.

(R.M.S.KHANDEPARKAR, J)

(DR.D.Y.CHANDRACHUD, J)